Private Law

Tortious Liability and Conflict of Laws

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Abstract: An intensive increase in international goods and services exchange has caused the appearance of a growing number of torts legally and factually related to two or more countries. Tortious liability is defined by internal regulation of international private law, certain international treaties and in some legal systems by court practices. Legal consequences of unlawful actions from which damage arises in potentially applicable internal law are often very different so that in the process of the decision on the merits the competent bodies face the problem of the conflict of laws. Conflict of law solutions of internal law most often rely on the application of the law of the place of a tortious act and law of the place where the event giving rise to the damage occurred. The development tendency of the conflict of law regulation is directed towards abandoning fixed solutions such as the application of *lex loci delicti commissi* and the acceptance of the rule of the closest connection as an alternative or exclusive solution.

Keywords: delictual liability; applicable law; tortious act; detrimental consequence; closest connection

The evolution of the regulation of tortious liability in the civil law doctrine started in the 30s of the previous century. The tendency of both theory and practice are directed towards more efficient and rightful compensation of damage that arise in many cases as a consequence of the use of dangerous materials and products. (Josserand, 1937, p. 7) Besides, the need for the state intervention that is supposed to provide the protection of the injured party, most often economically weaker party in relation to the responsible party, is more frequently mentioned. The transformation of the rules about civil liability influenced the change of the attitude about kinds of liability and the manner of compensation, regulation of the position of certain social categories, legal position of customers and the manufacturers' responsibility to them.

The problem of smaller or bigger differences in regulating all the elements of non-contractual relationship has not disappeared by passing several international conventions that contain substantive and conflict of laws solutions. Numerous legal systems with ordinary rules for compensation of damage make solving conflict of laws in this filed a current issue.

European countries that are members of several bilateral and multilateral international legal documents that stipulate special conflict of laws solutions regarding compensation of damage in traffic accidents and the responsibility of manufacturers for their products. The application of convention rules in the so-called third countries that are not members of the EU may in the future depend on the results of the accession process to this regional and international organisation, having in mind the issue of determination of the application area of the source of secondary and convention law.

In the EU legal system the codification of conflict of law rules for non-contractual liability was done by The Rome II Regulation, which reconciled the interest integrated in the tort law of non-contractual obligations of European states, the Union regulations in force and national legislation.

1. General Conflict of Law Rules regarding Delictual Liability (Comparative Law Review)

The issue of conflict of law solutions in the area of delictual relationships, starting from the middle of the previous century until the present day is in the middle of a scientific discussions. (Freund, 1968, pp. 5-6) The choice of tort law in the earlier period of the development of legal science did not represent an issue of a primary interest. Today, the situation is different and this represents one of the most interesting matters in doctrinal discussions. Comparative international private law accepts different conflict of law solutions while dealing with conflict of law in delictual relationships. Although ***lex loci delicti commissi*** principle dominates, other solutions are also applied such as *lex fori* and *lex loci delicti commissi* cumulatively, the law of the closest connection with specific solutions of certain American states (application of more favourable law, analysis of the state interest).

In the doctrine of European international private law there were no supporters of *lex fori* application as an exclusive delictual law. However, a number of theorists

insisted that for certain matters of delictual liability *lex fori*[1] together with *lex loci delicti commissi* should also be applied but only for the torts committed abroad. They assume that courts do not apply the same conflict of law provisions to torts committed abroad and torts committed in the native country. According to this and court practice, foreign law and law of forum should be cumulatively applied to tort qualification.

Lex fori as general conflict of law solution for tortious liability is abandoned today, apart from maritime torts committed on the open sea. In the period when the issue of applicable law was not mentioned this solution was dominant. Courts applied it as the only correct option in the disputes for which they decided they were competent. Besides, theorists also favoured the application of local law, particularly famous German authors Wechter and Savigni[2]. Today, there are few authors who support the application of this conflict of law solution as primary in conflict of law solving. (Ehrenzweig, 1960) (Sajko K., 1976, p. 9)

The source of conflict of law rules is court practice and the application of *lex fori* was characteristic for English judicature. The conflict of law solutions was different regarding local and foreign torts until the Law on international private law was passed[3]. The problem of conflict of law for English courts was an issue only in case of torts committed abroad. The conflict of law principles of tortious liability were set in the case Phillips v. Eyre and Machado v. Fontes[4]. The applied rules

[1] V Pack Delictual Liability for damage in International Private Law, Belgrade, 1972, Jezdic M, International Private Law, 174, Blagojevic B, International Private Law, 367 etc.

[2] Waechter rejects German statutory theory and finds that a judge decides only on the basis of the law of their own country. He derives the applicability of the law of forum from the function of criminal law and law on torts as observation of the principle of exclusive territoriality. According to Savigny, the regulations of law on torts are cogent regulations and an integral part of public order and therefore there is direct application of local law on torts. V Morse, Torts in the Private International law, Choice of Law in Tort: A Comparative Survey AJCL, 32, 1984, p. 7.

[3] Provision of Article 9, paragraph 6.

[4] The Governor of an island of Jamaica Eyre broke the rebellion in a cruel way. Phillips was taken into custody without a trial. Later, the circumstances in this country changed and he instituted proceedings for compensation of damage that was caused by his illegal imprisonment and offences that he suffered in England. Eyre pleaded to the Act of Indemnity, adopted in the Parliament of Jamaica after the rebellion was broken and by this act he and those who acted according to his orders were released from the responsibility for damage. The court found that for a delict committed abroad, one may get a compensation for damage before British courts only if two conditions were fulfilled – if the damage was actionable according to the English law and if the action was unlawful according to the law which, at the moment of tort committing, was in force in a foreign territory. As the measures the governor took against the rebels were legal at the time the request of the prosecutor, although he pleaded to the fact that the acts of colonies were not applied exterritorialy, therefore, without any effect in England, the court rejected the claim. Phillips v Eyre (1870) L.R. 6 Q B 1,10 B&S 1004 40,

correspond to the cumulative application of *lex fori* and *lex loci delicti commissi* rules. The court explained the choice of applicable law in the following manner: "If we are to decide about legal consequences of a foreign tort in England two conditions must be met and this illegal behaviour must be of such a character that if it were committed in England it would be actionable … and the behaviour must not be unjustifiable according to the law of the state where it was committed".

*Lex fori*i principle shaped by this decision was confirmed many years later by the decision in the case Boys v. Chaplin[1]. The adoption of the Private International Law (called Miscellaneous Provisions Act from 1955) meant the cessation of traditional application of *lex fori* in the collision law of delictual relationships. However, foreign law was marginalised until 1971 in order to start the application of cumulative conflict of law solution *lex fori* and lex loci delicti (Chesire, 1992, p. 533). American court practice was based on similar conflict of laws solutions, whereas the Restatement of International Private Law stipulates a larger number of conflict of law solutions for certain elements of tortious liability and the right to compensation of damage. Differently from English court practice, American court practice recognised the effect of foreign law but only if it was similar to the local one[2]. German legislation and court practice accept that in general, a conflict of law solution *lex loci delicti commissi* should be applied for delictual relationships[3]. If it directs to foreign applicable law, its application in local courts may occur only if the person responsible for the damage is a foreigner, and in other cases *lex fori* shall be applied. The application of rules of foreign applicable law is excluded if they are different from local law in understanding liability, the group of persons who are entitled to compensation, certain forms of compensations etc. (Morse, 1984, pp. 56-61)

L.J.Q.B. 28,22 L.T. 869. In the case Machado v Fontes the defendant offended the claimant by an inscription in Portuguese language in Brazil. According to the English law the offence is a tort that causes the compensation of damage whereas according to Brazilian law it is not. In spite of the fact that the damage was actionable according to English law and originated form unlawful action according to Brazilian law the action was rejected and the court declared it had no jurisdiction as Forum Shopping as the claimant was in more favourable position than it would be before foreign competent court as well.

[1] Boys v Chaplin (1971) A.C. 356.

[2] V. Morse, Tort in the Private International Law p 14; In § 145of Restatement, the conflict of laws regarding torts was solved in the following manner: the rights and obligations between parties in relation to the consequences of the tort are defined according to the law of "closest connection". This connection is particularly determined according to: the place where the damage occurred, the place where the cause of the damage occurred, domicile, residence, nationality, registration place, place of business of the parties and the place of the gravitation of the relationship between the parties.

[3] From the provision of article 12 of the Introductory law for Civil Law (1986).

The rules of tortious liability in French law were formed by court practice. In the middle of the previous century the Court of Cassation of France by the decision in the dispute Lautour v Guiarud (Loutaur v Guiarud, 1949, p. 89) determined lex loci delicti as a primary conflict of law principle which is abandoned only if foreign law is adverse to public order. The French Civil Law gives the character of the norms of direct application to the provisions that refer to torts which results in increased tendency of the application of the French Law of Torts (Lagarde, 1983, pp. 321-333)[1]. The tendency of the courts to apply *lex fori* is justified by the fact that in that way local public order is protected, the interest of local citizens, by the legal nature of Law of Torts or the fact that lex loci delicti may have an accidental character. (Freund, 1968, pp. 24-28)

1.1. *Lex Loci Delicti Commissi*

The facts that represent the most frequent connecting factors in Law of Torts of delictual relationship referring to the applicable law are the place where the damage occured (locus delicti) and the place where the event giving rise to the damage occurred (locus damni).

Lex loci delicti commissi, due to general acceptance in the doctrine, legislations and court practice, has become a universal conflict of laws solution. (Audit, 1991, p. 153) It was certainly most influenced by the relation of a tort and the law of the country where the tort occurred, in a delictual relationship. For a long time the doctrine considered this the most convenient solution to the conflict of laws with tortious liability, deriving theoretical justification from the principle of territorial sovereignty (Morse, 1984, p. 13) i.e. from the interest of the state to apply its own law and secure the observation of rules in the territory where the tort occurred. (Rabel, 1960, pp. 251-252) The protection of the country's interests and the parties themselves by the application of this conflict of laws solution, easy determination and application of the applicable law, legal security and uniformity of a solution satisfies the basic postulates on which international private law is based, i.e. its most typical part, the conflict of laws. (Hancock, 1982, p. 59) On the other hand, the tendency of the socialisation of indemnity, emphasising contemporary purpose and the goal of the law of torts in the context of its higher social benefit, put this

[1] Article 3, paragraph 1, Civil Code.

solution in the framework of a just individual indemnity. Social protection becomes the basic purpose of law of torts.[1]

According to an Austrian law from 1978[2] the requests for non-contractual indemnity were estimated by the law of the country where the tort was committed. Despite this, if for the parties there is a stronger connection with the law of the same country it will be used as applicable law.[3] Therefore, Austrian law stipulated lex loci commissi as a primary conflict of law solution, but it would not be applied if all the participants of a delictual relationship expressed close relationship with the law of one and the same state. Austrian legislator defines a special rule for unfair competition by relating the damage to the behaviour of a responsible person. This term is broader than "actions" but narrower than the "fact" as it means a subjective relationship of a responsible person to the damage, which in cases of absolute and subjective liability must be interpreted.

By the Greek Civil Law[4] the solution lex loci delicti is left without an alternative whereas Italian Law on the International Private Law generally stipulated the application of the solution, differently from the previous Civil Law[5]. In Check Law on the International Private Law *lex loci delicti commissi* is adopted as an exclusive solution.[6]

The law of the USA defines conflict of laws rule *lex loci delicti commissi* as general by the First Restatement, but it was later abandoned according to the critical attitude that it was strict and not elastic, apart from some American states that generally apply the law of the place where a tortious act occurred.[7]

By increasing complexity of conditions of the occurrence of international torts, the application of the law of the place of a tortious act imposes the need to question its relevance and applicability. International community, faced with new forms of torts that often have disastrous consequences (nuclear damages, industrial explosions etc.) sets delictual liability to the level of collective liability, with special systems of different kinds of insurance appearing in a parallel function with it. In such cases, the issue of *lex loci delicti* application in conflict of laws solutions is

[1] Rabel E, quoted work, p. 252.
[2] Austrian Federal Official Gazette no. 304/78, 119/98, 18/99, 135/00.
[3] See article 48, para. 1.
[4] The Law on International Private Law Article 62.2; 63.
[5] Civil Law (1940) provision of the Article 15.
[6] The Law on International Private Law Article 15.
[7] §377 of the First Restatement.

questioned. Industrialisation, mass distribution of goods, increase in tortious acts that go across the borders of one legal system influence the fact that the place of incident may be accidental or difficult to define. Having in mind the fact that for the application of *lex loci delicti* a correct location is necessary, the necessity of modernisation of the law of torts was obvious. Some national legislation has considerably changed law of torts among which a model of standardization of national rules of the EU countries is the most significant.

Through the activities of international organisations at the international law level, there were attempts to codify the entire law of torts, but only specific conflict of laws regulation was unified only for road traffic accidents and for the responsibility of manufacturers, by adoption the Hague Conventions on the law that is applicable to road traffic accidents (1971) and the conventions on the law that is applied in cases of manufacturers' liability for their products (1973, entered into force in 1977).

In spite of frequent inapplicability and rigidness in the situation of modern development of delictual relationships, *lex loci delicti* solution has retained the position of a general solution in a lot of national legislations although legal reforms were carried out.[1] One may depart from the rule of the place where a tortious act occurred, as a category of connection, to the benefit of a mutual right of a party, the right of a common nationality or common residence; the law applicable for pre-existing relationship lex causae; the law of the closest connection, choice between the place of the damage and the place where the event giving rise to the damage occurred and a mutual consent of applicable law choice – lex autonomiae. (Tomljenovic, 1998, p. 73)

1.2. Exceptions to the Application of *Lex Loci Delicti Commissi*

A mutual right of parties may lead to the exemption from the application of a general conflict of laws solution without necessarily implementing mutual national law. A court may, as a connecting factor for the determination of the applicable law, apply common residence in the same state, which is in comparative law the most frequent way by which exemption from the primary conflict of law solution is determined.

[1] Provisions of Article 133.2 of the Swiss Law on International Private Law.

Besides, if there is any earlier legal relationship between the parties, exemption from the application of the primary conflict of law solution may occur in accordance with it. The parties are in this case in a legal but not factual relationship as in the previous case. It is most frequently delictual behaviour that could be interpreted as infringement of a contractual obligation.[1] However, lex causae of the pre-existing relationship could be applied instead of *lex loci delicti commissi* only if the tort represents the infringement of this relationship as well.

The escape clause is the provision of the law which is referred to by a competent body when it wants to avoid the application of general conflict of laws rules or if the problematic relationship has closer connection with another law. The purpose of the provisions on the general escape clause consists of the prevention of inflexible legal solutions such as lex loci delicti. As a model of the provisions of the general escape clause a norm of the Swiss Law on International Private Law may be accepted, which explicitly says that an exemption from regular implementation of the applicable law for the benefit of the right of closest connection may occur but only exceptionally. It is important to note that the application of this clause must not put any of the parties in a privileged position. This law also stipulates that the parties are allowed to choose the applicable law by themselves, but only after the tortious act occurred and only if the choice of Swiss law was made.[2]

The principle of **autonomy of will** of the parties is not in accordance with law of the forum, but in the contemporary doctrine it is stated that there is no reason that would justify the prevention of the parties to choose the applicable law after a tort occurred. *Lex autonomiae* was accepted as a tort law in a few countries. The principle of parties' autonomy of will was applied in a decision of the Court of Cassation of France in the dispute Roco v Caron et al (1988, p. 71)[3] and Belgian court practice also has a positive attitude to parties' choice of law regarding tortious liability.[4]

Dealing with disadvantages in the implementation of *lex loci delicti commissi*, as a fixed conflict of laws solution is manifested through general rule in cases when the

[1] Such exemption is stipulated by The Law on International Private Law of Switzerland Article 133, para. 3 in relation to article 132 and 133, paragraph 1 and 2.
[2] Article 132 of the Law on International Private Law.
[3] Roho v Caron et al. Cour de Cassasion, 19.4. 1988. RCDIP, 1989, p. 71.
[4] More precisely Fallon M „L'incidence de l'autonomie de la volonte sur la determination du droit applicable ala responsabilite civil contractuelle" Melanges Daloq, Bruxelles, 1994, pp. 159-188.

place of a tortious act and the place where a tortious consequence occurred are not in the territory of the same state. The doctrine and practice of courts give different answers regarding the issue of applicability of one of these two laws for a problematic relationship. Nowadays, in the conditions of tortious acts whose consequences are, as a rule in different countries, these problems have become current issues, so that a number of legislations stipulate express solutions which localise a tort. The place of a tortious act for most European countries meant locus delicti, having in mind the fact that the place of consequences is sometimes difficult to determine.[1] However, EU legal systems start with a task of efficient indemnification of the injured party, so that the interest for indemnification is recognised to the state in which the damage was manifested. Delictual liability, regardless of the criterion, does not exist for itself so that without damage there is no liability. (Rabel, 1960, p. 303) Therefore, the place of a tort means the place of tortious consequences, which is characteristic for American theory and practice that accepts that the place of a tort is in the country in which the last event from which the responsibility of the perpetrator depends occurred.[2] This was the starting point in defining balanced rules in the system of countries within EU law.

In newer codifications of the third countries of the law of torts for non-contractual liability the law of the place where the action occurred and the law of the place where the consequence occurred is set alternatively and the application of one of these solutions depends on the fulfilment of other circumstances. The optional use of *lex loci actus* and *lex loci damni*, in case that these facts are not related to one state, is based on the "victim theory" so that the injured party can choose the law which is more favourable for them. The "victim theory" goes back to France at the time of the introduction of humanistic ideas into legal regulation of tortious liability. The court must determine ex officio, by the comparison of the law of the place of a tort and the law of the place where the damage occurred, which law is more favourable for the injured party a therefore the applicable law as well.

The place of the consequence, as a conflict of law solution becomes more and more prominent in doctrine discussions and legislations. The law of the place of damage essentially becomes the primary conflict of law rule in solutions regarding conflict of laws with delictual liability.

[1] Such solution is accepted in Greece, Spain (article 10(9) of the introductory part of the Civil Law from 1974; conditionally in Austria paragraph 48(1) LIPL.
[2] §377 of the First Restatement accepts the rule of the last action.

2. The Application of Law in the Closest Connection with the Controversial Relationship

In European-continental law the principle of the closest connection represented a flexible conflict of laws rule as an exemption from the general rule. Having in mind the fact that the law of the country in which the tort occurred is not always the law in the closest connection with the problematic relationship a lot of legislative solutions had to undergo certain changes. From the need to predict additional connecting circumstances which would make the general solution more flexible and reach the righteousness of the final solution, the rule of the closest connection through the influence of the law of torts of the countries of "general law" in European countries received its full expression in the escape clause as an exemption from the application of *lex loci damni* rule. It is important to note that before the unification, for example, Austrian law pointed to the application of the law in the closest connection not precisely defining which law it is. It was about open clauses within which the courts could apply the conflict of laws rule *ex officio*. It is considered that there is closer connection when the responsible person and the injured party have the same nationality or domicile in the same territory.

The dominant relationship of English law (*lex fori*) compared to the foreign law (*lex loci delicti commissi*) was terminated by the decision in the dispute Boys v Chaplin[1]. According to this decision, the tort is supposed to be unlawful according to *lex fori* but also according to *lex loci commissi*. This decision is more famous for the fact that it established the rule that, if there are justifiable reasons, a judge may give up the application of the cumulative application in order to apply the law which is in the closest connection with the problematic relationship even if it is the third right (the proper law of tort). The law of the country that has the closest connection with the problematic relationship indicated the application of an important circumstance, significant for the subject of the dispute. (Morris, 1951) Although English courts pleaded to the law in closer connection with the

[1] A defendant and claimant with permanent residence in England were temporary in Malta doing the army service. The defendant on a motorbike crashed into the claimant who drove, not very carefully, a vehicle registered in England. Maltese law provided only the compensation of material damage to the claimant, and according to English law it was possible to compensate for non-material damage. The problem of the conflict of laws was related to the scope of the damage. At that time the foreign law of the place where the damage occurred was applied only to unlawfulness of the tort and for all other issues the domestic law was applied. The court applied English law and awarded the compensation of material and non-material damage. The court of appeals confirmed the judgement at the second instance but the judges justified the application of English law in a different way. Some of them had the opinion that English law is the proper law of tort.

problematic decision only when, as a rule, it was English law at the same time, this decision means a big step forward in shaping the law of torts.

This rule is more often accepted by American doctrine and court practice[1] through the use of the most significant connection principle, as a norm in the Second Restatement.[2] The American conflict of laws regulation allows the court to choose, in every particular case, as applicable law, the law which is in the closest and most significant relationship with the problematic issue. The decisive circumstances that are supposed to lead to the applicable law are the place where the damage occurred, the place where the tortious action was committed; temporary residence; permanent residence; the place of registration and the place of business activity of the parties; the place where the relationship between the parties has a seat, if such a relationship exists. (Sajko, 1975, pp. 75-76) Restatement explicitly stipulates that the applicable law is determined only for the problematic issue, but not for the tortious liability in general. The rule of the closest connection, as a conflict of laws solution, was adopted for all torts in general and for all the issues that result from non-contractual liability. Besides, several solutions are stipulated for specific torts such as damage of things, wilful presentation of facts (*fraus legis*), slander, the infringement of the right to private life, international defamation etc. In spite of the criticism that this conflict of laws solution does not provide clear directives for conflict of laws solution, it is applied in most American states. (Reese, 1969, p. 190)

2.1. Unification of Conflict of Laws Norms of International Law of Torts in the Territory of the European Union

At the beginning of the application, i.e. by entering into force of the EU Regulation no. 864/2007 (The Rome II Regulation) autonomous provisions of the law of torts in the member states, except Denmark, cease to apply. The regulation becomes the main source of European international private law by entering into force of the Treaty of Amsterdam of 1st May 1999.[3] In European Parliament and European Union Council the passing of the regulation on applicable law for non-contractual

[1] Morris, quoted work 892 in the dispute Babcock v Jackson 12 NY 2d 473, 191 NE 2d 279.
[2] §145 paragraph 1.
[3] Treaty of Amsterdam amending the Treaty on the European Union; the Treaties establish the European Community and certain related acts OJ EC 1997, C-340/01.

obligations means the beginning of a new form of the new European international law of torts.

The general goal of the EU is building of freedoms, legal security and legal area where the freedom of movement of persons is guaranteed.[1] The goal of Rome II Regulation is the unification of conflict of laws regulations of autonomous law of the member EU countries and the prevention of forum shopping (Gottwald, 2007, p. 166)[2] in the Eu within the scope of tortious liability. It is supposed to facilitate the application of the principle of mutual recognition of judgements in civil and commercial matters.

The application of the regulation is related to civil and commercial disputes with a foreign element in the determination of the applicable law for tortious liability. The application of Rome II Regulation is particularly excluded with fiscal, customs and administrative disputes as well as with the responsibility of a country for acts and omissions in the exercise of authority. Besides, this regulation is not applied to non-contractual relationships in family relationships, inheritance relationship, in relation to bills of exchange, cheques and other transferable securities in relation to the rights of companies and personal liability of the members of the companies for company's obligations, in trusts relationships, nuclear damage, in relation to the rights violations regarding privacy of a person, in relation to evidence and procedures excluding the provisions of article 21 and 22 of Rome II Regulation.[3]

The provisions of the Regulation are applied universally, regardless of the fact whether it is the law of a member or non-member state, which leads to abandoning the double track of European international private law, differently positioned when a legal dispute is between the subjects of member states compared to non-member states. The Regulation must be applied to torts that occurred after it entered into force.[4] It does not affect the application of international conventions to which one or more member states were parties at the time it entered into force, and which contain conflict of law rules for tortious liability.[5] On the other hand, in its legal force, the Regulation shall be above international contracts exclusively concluded

[1] See Article 2, paragraph 4 of the Treaty on EU.
[2] The reasons for adopting the Regulation and the explanation of its provisions were presented in the first proposal of the EC Commission with a memorandum on 22nd of July 2003 COM (2003) 427, OJ 2004 C96/8, 4-6.
[3] Article 1, paragraph 2 ta, tb, tc, td, te, tf, tg; Article 1 paragraph 3 of the Regulation.
[4] The final provisions stipulate that the Regulation must be applied for tortious liability if the tortious action that caused the damage occurred after 11th May 2009.
[5] Article 28 paragraph 1 of the Regulation.

between two or more member states, if this international contract regulates the relationships contained in this Regulation.[1] After entering into force, the Regulation is directly applied in the member states as a general and binding act, in its legal force above autonomous law of torts of the member states.

When determining the applicable law for tortious liability Rome II Regulation stipulates a combination of objective and subjective decisive facts, but also the application of the closest connection principle. The Regulation regulates the place of a tort as a general decisive fact whereas, as exceptions from a general rule, it stipulates permanent residence of the injurer and the injured, the law in obviously closest connection with the relevant subsidiary decisive fact and the parties' autonomy of will. Therefore, the court of the member state in dispute regarding non-contractual obligation, takes the law of the country where the damage occurred, regardless of the fact where the tortious act occurred and where the direct consequences of the consequence of the act occurred[2]. This general rule has two exceptions and these are the cases when the responsible person and the injured party have permanent residence in the same country at the time of the damage, whose law shall be applicable. If the circumstances of the case clearly indicate that the tort is obviously more closely related to the country which is not the one that the previous rules refer to, the law of that country shall be applicable.

Essentially, the general rule of the Regulation confirms the application of *lex loci delicti commissi*, but in order to avoid legal insecurity, in case when the consequences of the tort are in different countries, the rule is made more concrete stipulating the application of the law of the country in which direct damage occurred. For direct damage that occurred in several countries, the laws of all these countries should be applied cumulatively. In cases of non-contractual relationships for which it is justifiable to apply one law for all cases, such solution follows the stipulated escape clause.

Apart from the general, the Regulation stipulates special rules for delictual liability that follows the damage caused by a product.[3] The applicable law means the law of the state in which the responsible person and the injured party have permanent residence at the time when the damage occurred. If it is not the case, the conflict of

[1] Article 28 paragraph 2 of the Regulation.
[2] Article 4 paragraph 1 of the Regulation.
[3] Article 5, paragraph 1In Luxemburg, Slovenia, Finland, France, the Netherlands and Spain the provisions of the Hague Convention on applicable law for liability for products are still in force. L Collins, Dicey and Morris on the Conflict of Laws, London, 2006, 35-211.

law norms of the Regulation that prescribe the application of subsidiary decisive facts shall be applied. The Regulation stipulates a special rule for the damage that is a result of unfair competition and the acts that restrict free competition, as well as for the obligations that resulted from the damage to the environment. This group of rules also includes conflict of law rules for the damage caused by the infringement of the right to intellectual property as well as for the non-contractual obligation in relation the responsibility of an employee or an employer or their associations for the damage caused by a strike or a lockout (industrial action).

The third part of the Regulation contains the rules about the determination of the applicable law for the obligations that arose from unjust enrichment, management without mandate (negotiorum gestio) and a liability for the damage during negotiations (culpa in contrahendo). The parties have the full freedom of choice of the applicable law according to autonomy of will after the tortious act occurred. However, if all the important elements of the case at the moment when the tortious act occurred are related to the country whose law was not chosen, the parties cannot derogate the imperative norms of the closest connected law by their own choice of another country.[1]

This Regulation is based on the traditional approach using the solutions that were already stipulated in the international private law of certain EU member states, but also takes care about the solutions contained in the law of some non-member countries (first of all, Swiss law).

Pursuant to the revision clause, the EU Commission will submit a report on the application and if necessary the change of the Rome II Regulation to the European Parliament and the Economic and Social Committee.

3. International Unifications of the Conflict of Laws Rule with Non-contractual Liability

The necessity of the unification of the law of torts with civil torts is based on the differences in national norms about tortious liability which reduce the application of the conflict of law solution *lex loci delicti commissi*. The unification was supposed to provide the application of uniform rules by the member states and eliminate problems in the application of different conflict of laws norms. However,

[1] Article 14, paragraph 2.

the general unification of material and tort law of delictual relationships was not achieved but certain special forms of non-contractual liability are the subject of successful international conflict of laws codifications. Within the framework of the activities of the Hague Conference for international private law, the unification of conflict of laws solutions for tortious liability caused by road traffic means of transport and liability of a manufacturer was done by the Hague Convention on applicable law for traffic accidents and the Hague Convention on the law that is applied in cases of a manufacturers' liability for their own products.

3.1. The Hague Convention on Applicable Law for Road Traffic Accidents

By the adoption of this convention special conflict of law rules of international private law for typical situations of delictual liability was formed. The Convention[1] accepts the traditional conflict of laws rule *lex loci delicti commissi* that stipulates the applicability of the material law of the country in which the accident occurred (article 3 of the Convention). The basic goal of the adoption of the convention is to facilitate the compensation of damage by means of motor insurance and the improvement of the position of the injured party. The existing system of the conflict of law solutions based on *locus delicti*, is amended, by a provision of this convention, by relevant facts. With the traditional conflict of solution, the convention also stipulates certain exceptions. If only one vehicle took part in the accident and it is not registered in the country where the accident occurred, the law of vehicle registration is applicable for determining the liability of the driver or the vehicle owner, regardless of their permanent residence.[2]

The law of the registration country is applicable for the damage sustained by a passenger who does not have permanent residence in the country where the

[1] The Convention from 1971 is in force in Austria, Belgium, Croatia, Spain, France, Macedonia, Luxemburg, Portugal, the Netherlands, Slovakia, Slovenia, Serbia, Switzerland, Check Republic, Bosnia and Herzegovina.

[2]The provision of article 4 (a); An Austrian decision in relation to the lawsuit for the compensation for damage that was the result of a car accident in Bosnia and Herzegovina in which only one vehicle registered in Austria took part is illustrative in that sense. The dispute arose in relation to the determination of the applicable law, particularly the issue whether article 4, subparagraph of the Hague Convention should or should not be applied. The decisive question was: Does the claimant, the injured party who was a passenger in the above mentioned vehicle have his permanent residence in Austria or Bosnia and Herzegovina? The claimant, at he moment of the car accident did not have permanent residence in Bosnia and Herzegovina but in Austria, because he spent most of his time at work and his spare time in that country.

accident occurred as well as the person who was outside the vehicle if their permanent residence is in the country in which the vehicle is registered.[1] If there are more persons in the accident the applicable law is determined for each person separately.

Therefore, the Convention stipulates a new relevant fact in the law of torts for liability that follows car accidents i.e. the place of the vehicle registration.[2] When several vehicles took part in the accident, the applicable law is the law of the place of accident, except if all the vehicles are registered in the same country.[3] If a vehicle is registered in more states or if it is not registered at all, the law of the country of "permanent residence" is used instead of the primary law of the country of registration and in that way defines the applicable law.

The conflict of laws solution of the application of the law of the registration place of a vehicle is based on the theory of "closer relationship" and it is a result of the idea that a solution should direct to the law which is in the closest relationship with the problematic relationship. The law of the registration place is the most convenient from the point of view of an insurer as well as the interest of other countries. According to the law and application of the convention conflict of laws rules, the following matters are evaluated: basis and scope of liability, a kind of damage, the number of persons who are entitled to the compensation of damage, the burden of proof, the liability of the giver of an order for the actions of a person under their control, limitation etc. Besides, the applicable law defines the rights of the injured party to institute proceedings against the insurer. The right to direct action is subject to the norms of the law applicable to the insurance contract.

3.2. The Hague Convention on Applicable Law for Manufacturers' Liability for their Products

The convention is applied in member states in all disputes in relation to the compensation of **damage caused by a faulty product. The convention rules in relation to manufacturers' liability** represent derogation from general conflict of law solution lex loci delicti.

[1] Ibid. Austrian decision is also interesting, OGH of 28th April 1994.
[2] In more detail, Loussarn Y La Convention de la Hayes sur la loi applicable en maltiere d'accidents da la circulation routiere Journal Clunet 1/69, pp. 1-21.
[3] Article 4 (b).

Through intensive development of international business and product distribution there is a need for determination of the applicable law and unification of different conflict of laws norms and the manufacturers' tortious liability caused by final products or integral parts of products; persons who do repairs and have warehouses and who perform preparation and distribution of products in a trade network; the representatives and staff that works under the control of such persons, including the damage that was the result of incorrect description of products or lack of the description of its special features and the mode of usage[1] The convention defines certain terms in relation to this such as a product, a person, damage, applicable law etc. in order to avoid the problem of qualification in the law of the contracting countries.[2]

The applicability of *lex loci delicti commissi* is conditioned by the correspondence of this solution with one of the following facts: with permanent residence of the directly injured party, the registered office of the person responsible for the damage or the place where the person sustained direct damage by buying the product that caused the damage. (Dutoit, p. 429)[3] The place of the damage is only one of the decisive facts which, together with others, define the applicable law, i.e. to the application of the law in the closest connection with the problematic relationship. The convention gives particular significance to the law of the permanent residence of the injured party, but only if the place of the permanent residence corresponds to the place of business of the responsible person or with the place in which the person that sustained damage bought the product.[4] Besides, the application of this decisive fact is conditioned by the idea that the person who is responsible could have predicted the application of the law of the permanent residence. For the application of the law of the registered office, it is necessary that the conditions for the application of the law of the place of a tortious act or the law of the permanent residence of the injured are not met and that the injured party did not plead to this right because of more favourable application of the place where the tortious act was committed. The applicable law is applied to the basis and the scope of liability of a manufacturer, reasons for a release from liability, restriction and division of liability, kind of damage, manner and scope of compensation, transfer of rights to compensation to third parties, liability of a giver of an order and the staff under

[1] Article 1 in relation to Article 3 of the Convention.
[2] The Convention from 1973 is in force in, Belgium, Spain, Finland, France, Italy, Luxemburg, Norway, the Netherlands, Portugal, Slovenia, Serbia.
[3] Article 4.
[4] Article 5.

their control, the burden of proof, limitation, loss of rights.[1] The convention makes a distinction between the regulations about the country security where the product appeared in the market and the rule of public order, so that a foreign applicable law shall not be applied only for the reason of the violation of the public order of the contracting country. On the other hand, the security regulations in a foreign law cannot be excluded.

The convention is applied regardless of reciprocity, and the provisions about the applicable law include the countries that are not contracting countries. In them the convention has *lex specialis* effect, whereas in the member states these solutions have the force of the rules of domestic law in all the disputes caused by a faulty product.

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[1] Article 8.